

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MS CONSTANCE CHENG

APPLICATION NO: 24/2772

PANEL: MR ROBERT NASH (CHAIRPERSON)
MS JOHANNA OVERMARS (MEMBER)
MS NATALIE SINTON (MEMBER)

DATE OF HEARING: 29 January 2024

DATE OF DETERMINATION: 26 August 2024

IN THE MATTER OF an appeal by CONSTANCE CHENG against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 16 June 2023 to disqualify STAR PRESENT from: Race 4 at Ascot on 9 April 2022 pursuant to AR 240; races at Ascot on 23 April 2022, Pinjarra on 5 May 2022, Belmont on 21 May 2022, and Kalgoorlie on 29 May 2022 pursuant to AR 242(b); and not to permit STAR PRESENT to start in any race, official trial or jump out for a period of not less than 12 months from the date of collection of the sample until an Anabolic Androgenic Steroid Clearing Certificate is provided pursuant to AR 248(4) of the Rules of Thoroughbred Racing

Ms Constance Cheng self-represented and assisted by Dr Hong Tong Low, Mr Stephen Crutchley and Mr Brock Lewthwaite.

Mr Knorad de Kerloy, assisted by Mr Stephen Waddington, represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Summary

1. The Appellant, Constance Cheng, appeals against the following penalties that have been imposed by the RWWA Stewards following the detection of testosterone and boldenone in a post-race urine sample taken from STAR PRESENT after it won Race 4 at Ascot on 9 April 2022:
 - a) Disqualification of STAR PRESENT from Race 4 at Ascot on 9 April 2022 pursuant to AR 240 of the RWWA Rules of Thoroughbred Racing (“**Rules**”);
 - b) Disqualification of STAR PRESENT from races at Ascot on 23 April 2022 - 3rd place; Pinjarra on 5 May 2022 - 1st place; Belmont on 21 May 2022 - 6th place, and Kalgoorlie on 29 May 2022 - 2nd place pursuant to AR 242(b); and

- c) The banning of STAR PRESENT from starting in any race, official trial or jump-out for a period of not less than 12 months from the date of the collection of the post-race urine sample taken on 9 April 2022 and until after an Anabolic Androgenic Steroid Clearing Certificate is provided.
2. For the reasons that follow, we dismiss the appeal.

Reasons

3. Constance Cheng ("**Ms Cheng**" or "**the Appellant**") is one of the owners of the thoroughbred mare, STAR PRESENT.
4. On 9 April 2022, a post-race urine sample was taken from STAR PRESENT at Ascot after the mare won Race 4.
5. The sample was divided into two bottles labelled Sample A and Sample B. Sample A was analysed by RWWA approved lab, ChemCentre. The ChemCentre's certificate of analysis dated 31 May 2022 recorded that a testosterone reading was found in excess of 110 ug/L when the threshold is 55 ug/L and boldenone was also detected. There is no prescribed threshold level for boldenone. It was found that the reading of testosterone was 396 ug/L which is a particularly high reading.
6. As there was a positive result, the ChemCentre ran the test multiple times to check their results. In doing so, the whole of the urine sample was used.
7. Due to the result, the B sample was analysed by the referee laboratory, Racing Analytical Services Limited (RASL). The results contained in RASL's certificate of analysis dated 29 June 2022 confirmed a reading of testosterone at a mass concentration of greater than 100 ug/L and that the sample also contained boldenone.
8. Since the results were unknown to the trainer, Mr Brock Lewthwaite ("**Mr Lewthwaite**") or the owners of STAR PRESENT, the horse continued to race between April and May 2022. Only two weeks after the positive sample was taken, the mare raced at Ascot on 23 April 2022, where she came in third place. A post-race urine sample was taken and the test results were negative for testosterone and boldenone.
9. RWWA Regulatory Veterinarian, Ms Caroline McMucllen and Senior Investigative Steward, Mr Paul Criddle, attended Mr Lewthwaite's stables on 2 June 2022.
10. Following a Stewards inquiry, Mr Lewthwaite was convicted by the Stewards under AR 240(2) for presenting STAR PRESENT not free of prohibited substances and his licence was disqualified for a period of 10 months.
11. Mr Lewthwaite appealed to this Tribunal against conviction and penalty and on 26 September 2023 the Tribunal delivered a determination dismissing the appeal.
12. The owners were not parties in Mr Lewthwaite's appeal and there was a short continuation of the Stewards Inquiry on 29 May 2023 ("**Inquiry**") to consider further matters raised by the owners, and certain decisions of the Stewards under the Rules specific to the owners.

13. At the Inquiry, Ms Cheng put forward a number of possible scenarios which she argued could have caused the testosterone and boldenone levels detected, including that STAR PRESENT could have unknowingly been transiently pregnant; or the sample was switched with a male horse; or the sample was contaminated. Ms Cheng was critical of the testing methods and the fact that no sample was provided to the owners or trainer so that they could have the sample tested. She was particularly critical of the fact that the Stewards did not provide test results which showed STAR PRESENT was not pregnant at the time of the swab.
14. During the Inquiry, Dr Judith Medd, RWWA Veterinarian, was called to provide evidence, along with Dr Buddhika Dorakumbura, Acting Team Leader from the ChemCentre.
15. The Stewards found that there was no evidence of contamination or switching of the samples and that in their view there was no evidence of STAR PRESENT being pregnant.
16. Following their decision, the Stewards provided Ms Cheng with a copy of their reasons dated 16 June 2023 (“**owners reasons**”) and their previous reasons for decision dated 20 February 2023 in relation to Mr Lewthwaite’s conviction (“**trainers reasons**”).

The Appeal

17. Ms Cheng filed a Notice of Appeal dated 29 June 2023 (“**Appeal Notice**”) which set out 17 grounds of appeal.
18. In summary, those grounds allege that the Stewards erred in their application of the Rules in their reference to previous cases, and by failing to take into account matters unique to the case including Mr Lewthwaite’s unblemished record, lack of motive and evidence supplied in an expert report written by Doctor Thomas Tobin, a Toxicologist, Pharmacologist and Veterinarian dated 25 August 2022 (“**Dr Tobin report**”) and subsequent report dated 19 May 2023 where he answered specific questions (“**Answer to Questions**”). These reports had been before the Stewards at the Inquiry.

The Tribunal Hearing

19. At the hearing before the Tribunal, Mr de Kerloy of counsel, on behalf of the Stewards, submitted that the appeal should be dismissed on the basis that it was argued no error by the Stewards could be demonstrated.
20. Both the Stewards and Ms Cheng filed written submissions, which were filed just before the hearing.
21. The Tribunal addresses each of the grounds of appeal below.

Ground (a)(1) First Certificate of Analysis

22. Ground (a)(1) in the Appeal Notice contends:

‘The Stewards erred by not complying with AR259(3) so that there was no First Certificate of Analysis to proceed further’.
23. The Appellant did not proceed with this ground at the hearing, as noted in her written submissions at paragraph 10.

Ground (a)(2) Alleged Pregnancy of STAR PRESENT

24. Ground (a)(2) in the Appeal Notice is in the following terms:

'The Stewards erred by presenting a charge AR240 without documentary evidence that STAR PRESENT was not a pregnant mare. The deduction of Dr Medd to rule out pregnancy is flawed.'

25. Ms Cheng submitted the approach of Dr Judith Medd, RWWA Veterinarian, was unacceptable because AR 240(3) requires scientific and analytical evidence and the Stewards should have retained a urine sample which could be subsequently tested. Doctor Tobin's report noted that the sample immediately prior in sequence to that taken from STAR PRESENT was from a male horse and to rule out the potential occurrence of a sampling or labelling error it would be entirely appropriate to gene test the sample labelled ANA220413_029 (taken from STAR PRESENT) to make sure that the sample had not been in some way been confused with sample ANA220413_028, which was the sample taken from the male horse.

26. Rule 240 is set out in the following terms:

'(1) Subject to subrule (3) if a horse is brought to a racecourse and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the horse must be disqualified from any race in which it started on that day.

(2) Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List a AND/OR Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australia Rules.

(3) If:

(a) testosterone (including both free testosterone and testosterone liberated from its conjugates) above the mass concentration set out in paragraph 7(a) or (b) of Schedule 1, Part 2 Division 3 (as applicable); or

(b) hydrocortisone above the mass concentration set out in paragraph 6 of Schedule 1, Part 2, Division 3,

Is detected in a sample taken from a horse prior to or following its running in any race a PRA or the Stewards retain a discretion to find that a breach of subrule (1) or (2) has not been committed if, on the basis of scientific and analytical evidence available to them they are satisfied that the level in the sample was of endogenous origin and/or as a result of endogenous activity.'

27. Rule 240 establishes that when a horse is brought to a racecourse and a prohibited substance is detected in a sample taken from the horse prior to or following running in any race a breach of the Rules occurs. Discretion is afforded to the Stewards under AR 240(3) to find no offence has been committed, if the Stewards are satisfied, on the basis of scientific and analytical evidence, that the level in the sample was of endogenous origin and/or as a result of endogenous activity.

28. Three known circumstances in which an elevated level of testosterone in a horse can be endogenous in origin or as the result of endogenous activity are where the horse has a tumour, is intersex, or is pregnant.
29. An Anti-Mullerian Hormone test was conducted on STAR PRESENT which ruled out the possibility of the horse being intersex or having a tumour.
30. During the Stewards Inquiry, they explored the possibility of STAR PRESENT being pregnant. In finding that was unlikely, they considered:
 - a) the evidence of the trainer, Mr Lewthwaite, given during the investigation where he confirmed STAR PRESENT had not been served and his lack of indication there was reason to suspect it was likely she had been served;
 - b) the manner in which STAR PRESENT was being kept and Mr Lewthwaite's extensive experience with racehorses, which detracted from the possibility of the mare being unknowingly served;
 - c) the lack of any physical signs of pregnancy;
 - d) the lack of any signs that the mare had aborted a pregnancy; and
 - e) the evidence of Dr Medd that the level of testosterone detected and the subsequent negative swab taken two weeks later, made an early pregnancy which had either been absorbed or aborted unlikely.
31. Dr Medd's evidence to the Stewards Inquiry was that mares can only be diagnosed of early pregnancy by way of an ultrasound examination (Inquiry Transcript dated 29 May 2023 ("**Transcript**") at page 28). This is because pregnancy hormones are not found in the blood or urine until after 90 days of pregnancy.
32. Dr Medd went on to say that in the last 20 years as a RWWA veterinarian she had never seen a laboratory report of a testosterone level over the threshold of 55ug/L in any mare that was subsequently notified as pregnant. In her view 55ug/L is a very generous threshold for a mare given the mean level for the international population was 8.3ug/L (see Transcript at page 29). In Dr Medd's view, if STAR PRESENT was pregnant in April 2022 the reading would still have been elevated when she was swabbed again on 5 May 2022.
33. The Stewards considered Dr Tobin's theory that STAR PRESENT could have been in the early stages of pregnancy involving absorption of the embryo. The Stewards found that was unlikely to account for the high level of testosterone detected. They also considered that an early pregnancy which was aborted was unlikely to have escaped notice.
34. Contrary to Ms Cheng's contention, we do not consider that Dr Medd's evidence was flawed. Dr Medd's evidence was one part of the overall factual and evidentiary context considered by the Stewards in assessing the issue of whether there was a scientific or analytical basis for the high level of testosterone detected.
35. As explained below, there is also no requirement in the Rules for urine samples (or parts thereof) to be retained so that trainers or owners can have further testing done on the sample.

36. In our view, the Appellant has not established that the Stewards erred in failing to be satisfied that the levels of the prohibited substances detected in the sample were not attributable to the pregnancy of the horse.

37. This ground of appeal is dismissed.

Ground (a)(3). Anti-Mullerian Hormone

38. Ground (a)(3). in the Appeal Notice contends:

'The Stewards erred by considering AR240(3) based on documentary evidence of negative Anti Mullerian Hormone (AMH) test but without documentary evidence of negative pregnancy test. The Stewards erred on relying physical signs to rule out pregnancy based on Trainer Brock's statement, which is inconclusive as a mare can be pregnant to full term without the trainer being aware. The Stewards did not respond to new evidence of Adorable III.'

39. Ms Cheng relied on a newspaper article dated 7 November 1990 where a mare named ADORABLE III was transported from Australia to Singapore and birthed a foal just prior to being loaded on a float. The birth came as a shock to her handlers. The article notes that she looked fatter on arrival in Singapore but no one at her training stables thought anything was 'amiss'. The investigation into the father centred around a stallion known to be around at her point of departure.

40. Ms Cheng submitted that the Stewards failure to respond to this evidence brought them into error. She used this evidence as an example to support her submission that it is unsafe to rely on physical symptoms to rule out pregnancy.

41. It is clear that the Stewards formed their view that STAR PRESENT was not pregnant after considering the whole of the evidence and circumstances relevant to that horse. The lack of reference to an article regarding ADORABLE III does not demonstrate any error on the part of the Stewards.

42. This ground is, accordingly, dismissed.

Ground (a)(4) Alleged Failure to Provide Urine Sample

43. Ground (a)(4) in the Appeal Notice is in the following terms:

'The Stewards did not avail us of a urine sample to conduct our own investigations, thereby denying us any chance to gather definitive documentary evidence on endogenous origin or sample identity etc, which they did not do. The Stewards did not observe the general rules of sample analysis and facilitation of proof:

- i. AR 258(1) on samples or portions of a sample stored and/or retained;*
- ii. AR 259 on using portion or aliquot not whole sample; and*
- iii. AR 259 (11) on resting of sample.'*

44. Ms Cheng submits the Rules require a reserve sample to be made available for independent testing. As all of the reserve sample was used, the owners were unable to conduct their own testing.

45. Part 12 of the Rules is titled 'Sample Analysis & Facilitation of Proof' and provides:

Division 1- General rules

"AR 258 General rules -

(1) Samples may be analysed by a PRA or the Stewards, including without limitation for the purposes of identifying prohibited substances and/or prohibited methods referred to in these Australian Rules and to assist to profile relevant parameters in a horse's urine, blood, hair or other matrix. This applies to all samples, which includes stored samples (being samples or portions of a sample stored and/or retained, including for future analysis for purposes consistent with the Rules)".

Division 2 – Sample analysis and facilitation of proof

AR 259 Sample analysis and facilitation of proof

(1) A sample taken from a horse ("relevant sample") may be provided by or at the direction of a PRA or the Stewards to an Official Racing Laboratory ("First Laboratory").

(2) A portion or aliquot of the relevant sample analysed by the First Laboratory will be referred to as the "A Portion".

(3) As soon as practicable after analysis of the A Portion is complete, the First Laboratory must notify its findings to the PRA or the Stewards from whom the relevant sample was received, by providing a written record in the nature of a Certificate of Analysis ("First Certificate of Analysis").

(4) A second portion or aliquot of the relevant sample, together with any control of the relevant sample, may be provided by the First Laboratory to another Official Racing Laboratory ("Second Laboratory") for confirmatory analysis by it. Where that is done, the second portion or aliquot of the relevant sample provided to the Second Laboratory will be referred to as the "Reserve Portion".

(5) As soon as practicable after analysis of the Reserve Portion is complete, the Second Laboratory must notify its findings, by providing a written record in the nature of a Certificate of Analysis ("Second Certificate of Analysis"), to: (a) the PRA or the Stewards that provided the relevant sample to the First Laboratory; or (b) the First Laboratory, which must then provide a copy of that certificate to the PRA or the Stewards that provided the relevant sample to the First Laboratory.

(6) If the results stated in the Second Certificate of Analysis confirm that: 151 (a) the prohibited substance detected in the Reserve Portion is the same as the prohibited substance detected in the A Portion; and (b) the prohibited substance detected in the A Portion and the Reserve Portion is not detected and quantified in any control of the relevant sample, then the provision of the Second Certificate of Analysis will, together with the First Certificate of Analysis, constitute prima facie evidence that the relevant sample contains a prohibited substance.

(7) If only one Official Racing Laboratory is either able, or available, to analyse both the A Portion and the Reserve Portion, then that laboratory can analyse both the A Portion and the Reserve Portion, provided that they are each analysed by separate qualified analysts or groups of analysts (so that no one analyst or group of analysts participates in the analysis of both the A Portion and the Reserve Portion).

(8) If a Certificate of Analysis states that a prohibited substance was detected in a sample, the PRA or the Stewards which receive the result must communicate that to the trainer of the relevant horse as soon as reasonably practicable.

(9) Nothing in AR 258 or subrules (1) to (8), including a PRA, the Stewards and/or an Official Racing Laboratory not following any procedures set out in those subrules, precludes a PRA and/or the Stewards from charging a person with breaching these Australian Rules and/or establishing: (a) that a horse was administered a prohibited substance; or (b) that a horse was not presented to start in a race, official trial, jump-out or attend another form of test free of prohibited substances; or (c) that a horse had at a particular time a prohibited substance in its system, in ways other than through relying on the prima facie evidentiary effect of two Certificates of Analysis which is stated in subrule (6).

(10) A PRA or the Stewards may retain a sample, or portion or aliquot of a sample, taken from a horse for their own purposes, including without limitation to conduct their own testing or analyses (including screening tests). It is a matter of the discretion of a PRA or the Stewards as to whether they communicate the results of their own internal analyses within a reasonable time of them being received, or at all. Those analyses may be used at the discretion of a PRA or the Stewards, including for the purpose of investigations, inquiries, intelligence and/or prosecuting breaches of these Australian Rules. If an internal analysis is used to prosecute a breach of these Australian Rules, the relevant PRA or the Stewards must communicate the results of that analysis to the person/s the subject of the prosecution.

(11) Retesting of a sample, or portion or aliquot of a sample, is permitted to occur under these Australian Rules. Where that is done, the evidentiary effect stated in subrule (6) is able to be relied on where the results of two Certificates of Analysis record that a prohibited substance is detected in a sample.

(12) If a prohibited substance is detected in a stored sample submitted or resubmitted for testing and that sample was taken from a horse prior to or following its running in any 152 race, whether or not the horse is to be disqualified from a race it took part in is a matter for the discretion of a PRA or the Stewards.

(13) Any sample taken from a horse prior to the date on which this rule takes effect which has not been analysed as at that date must be dealt with in accordance with subrules (1) to (12), provided that if a portion or aliquot of the sample has been analysed prior to this rule taking effect, the rules in force immediately prior to that date apply in respect of analysing the sample and proving that it contains a prohibited substance.

46. Whilst it is unfortunate that there was no sample available for the owners to conduct their own testing, there is no requirement in the Rules for the Stewards to retain a portion of sample A or B for owners or trainer to test.
47. The non-provision of a portion of the sample to the owners or trainer, does not give rise to any error on the part of the Stewards.
48. This ground is, accordingly, dismissed.

Ground (a)(5) Alleged Sample Switch

49. Ground (a)(5) in the Appeal Notice is in the following terms:

'The Stewards was (sic) not transparent in responding to our queries on the three sheets of lab raw data that we uncovered as involving STAR PRESENT and other horses. At the Owners Inquiry we raised concerns of a sample mix-up between STAR PRESENT and the colt SNOWDOME who won the earlier race. Dr B Dorakumbura was silent throughout the Owners Inquiry and did not respond to our queries then. After the Owners Inquiry the Stewards denied, without documentary evidence, that SNOWDOME's data is inside those three sheets of lab raw data.'

50. It was submitted by Ms Cheng that it is possible STAR PRESENT's urine sample was mixed up at the lab with the sample of the colt SNOWDOME who had won the race prior. During the Inquiry this issue was explored in depth.

51. The ChemCentre file was Exhibit 18. In it there are several pages of data titled 'starting sequence Wed April 13 15:07:57 2022'. There are 54 lines with the type, vial, data file and sample name listed. Line 29 belongs to STAR PRESENT. Further information is noted saying '(F) Testosterone 527 ng/mL. HOLD and repeat separately. Also high 5a-androstane-3b, 17b DIOL'.

52. The ChemCentre file was provided to Dr Tobin for the purposes of his reports. In his Answers to Questions, Dr Tobin commented on page 17, that the horse post-race sample immediately prior to STAR PRESENT was an entire male horse and to rule out the occurrence of post sampling confusion / sample labelling error it would be entirely appropriate to gene test the sample labelled ANA220413_029 to make sure that this sample had not been in some way confused with sample ANA220413_028 an entire male sample collected after the preceding race.

53. There is no provision in the Rules for samples to be gene tested, before the Stewards can safely rely on lab results.

54. Dr. Dorakumbura, the Acting Team Leader at the ChemCentre and the person who put together the laboratory report was called to give evidence, but the Stewards were unable to hear her and were concerned she could also not hear them properly. The Chairman decided the best way to proceed was for Dr. Dorakumbura to provide a response in writing.

55. This prohibited Ms Cheng from being able to cross examine Dr. Dorakumbura about the laboratory data.

56. Dr. Dorakumbura's letter, Exhibit 50(a), dated 2 June 2023 stated:

'...the sample of STAR PRESENT was first screened for anabolic steroids on 13 April (refer exhibit 18). At this stage the sample was pooled with another female equine urine sample (data file ANA220413_29). This pooled sample had a testosterone level above the threshold for female equine urine (55ng/mL). The sample just above is a male sample. (with the comment Male profile, okay), the number 23 right next to it is the reference number assigned to the pooled sample...

The sample was repeated separately on 21 April (data file ANA220421_007). The urine sample that was pooled with STAR PRESENT's in the previous week is just above (data

file ANA220421_005). We have annotated both samples with (F) to indicate these are female samples. The concentration of that female sample (ANA220421_005) is less than 55ng/ml...and the sample in question...has returned with an approximate concentration of 540ng/ml. The male sample from the original screen is not in the repeated analysis batch...

The samples prior to the sample for STAR PRESENT in the two screening analyses have not been from the same horse, or from horses of the same sex. The screening analyses were also performed on different days...

The urine sample of STARPRESNT was analysed three times at CHemCentre each time a resh aliquot of urine was poured from the A sample bottle including a confirmation analysis that only included the sample from STAR PRESENT and another sample for confirmatory analysis. The sample indicated high levels of testosterone each time. It is highly unlikely that the wrong sample was poured by different analysts on different days and ended up at similar conclusions.'

57. Whilst it is always preferable that a witness be available for cross examination, we do not agree that the Stewards failed to be transparent. The lack of cross examination of Dr. Dorakumbura does not mean that there was a resultant denial of natural justice or that the Stewards erred in relying on her evidence contained in the letter.
58. In addition to that evidence, the Stewards considered the confirmatory results from the RASL laboratory.
59. Ms Cheng's submission is that a sample switch could have occurred prior to the sample arriving at the ChemCentre for testing.
60. During the Inquiry Dr Medd gave detailed evidence that the chain of custody was intact for STAR PRESENT's sample (see pages 33-34 of the Transcript). Mr Lewthwaite in his evidence confirmed when the test was done a member of his stable witnessed the swab and there was only one horse present. There is no evidence pointing to a sample switch.
61. Ms Cheng has not shown any error on the part of the Stewards in their consideration of the evidence regarding the laboratory results or the chain of custody for STAR PRESENT's sample.
62. This ground, accordingly, is dismissed.

Ground (a)(6)

63. Ground (a)(6) in the Appeal Notice reads:

'The Stewards erred in using Harness Rule of Racing 190 as a precedence relating to the trainer's charge under AR240.'
64. AR 240 provides that *'if a horse is brought to a racecourse and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the horse must be disqualified from any race in which it started on that day.'*
65. The Rules of Harness Racing Rule 190 provides that *'A horse shall be presented for a race free of prohibited substances.'*

66. While the wording is not identical, both sections clearly provide for what is known as a presentation offence.
67. The Stewards, in their reasons at paragraph [11], cite the determination in *Stanley v RWVA Stewards of Harness Racing* which dealt with a contravention of Rules of Harness Racing Rule 190 in which it was said that there '*can be no innocent explanation in any allegation of an offence against*' the Rule and that '*intent is not an element and mistake of fact is no excuse*'.
68. That the determination referred to relates to an equivalent provision rather than the exact same provision does not impact on the applicability of the relevant principles.
69. AR 240 states that if a horse is brought to a racecourse and a prohibited substance found in a sample taken from it, the horse *must* be disqualified. AR 240 does not have intent as an element. In these respects, it is comparable to Rules of Harness Racing Rule 190 and reference to that provision was not in error.
70. This ground fails.

Ground (a)(7)

71. Ground (a)(7) in the Appeal Notice reads:

'The Stewards did not response (sic) to numerous points made in Pro Tobin's Expert Report such as endogenous origin, lack of NATA accreditation of laboratories, hydrolysis/non hydrolysis tests to rule out contamination.'
72. At the commencement of their reasons for decision, the Stewards noted that given the volume of material in this matter, '*it is neither practical nor pertinent to the determination of the matters now before us to refer to every aspect or repeat all of the detail previously set out where it remains applicable. Suffice to say all materials have been considered in arriving at the decision we now set out*'. Failure to specifically refer to a matter is not therefore evidence of failure to consider it. It is further noted that the Stewards had considered and addressed similar issues in their determination in relation to STAR PRESENT's trainer Brock Lewthwaite.
73. In any event, the Stewards devoted a significant portion of their reasons to the theory that STAR PRESENT was transiently in foal (pregnant) and that the contested readings were of endogenous origin.
74. The Stewards did not accept this theory, which was speculative and not supported by any evidence that STAR PRESENT had had any opportunity to become pregnant.
75. Further, the Stewards considered and rejected the possibility of contamination at paragraph [38] of their reasons.
76. This ground fails.

Ground (a)(8)

77. Ground (a)(8) of the Appeal Notice contends:

'The Stewards did not take into consideration this unique case (mare with very high testosterone) with no motives and unblemished track record of trainer.'

78. We would repeat our observations made in respect of Ground (a)(7) above and add to them that the Stewards expressly considered the issue of lack of motive at paragraphs [11] – [12] of their reasons, but considered that such matters did not have sufficient weight to overturn the analytical evidence. As noted above, intent is not an element and mistake of fact is no excuse.

79. This ground, accordingly, fails.

Ground (a)(9)

80. Ground (a)(9) of the Appeal Notice contends:

'The transcript of the Owners Inquiry is incomplete and inaccurate in certain parts such as no written record on three irrelevant precedents cited by the Stewards regarding absolute liability. We had requested twice for the audio recording, to which we are entitled, prior to the availability of the transcript, but received no response.'

81. In written submissions the Appellant states that the transcript *'did not record about their three irrelevant precedents which Dr Low highlighted'*.

82. Dr Low's references to precedent were transcribed as follows *'Now, in the reasons for decision, you mention about a [indistinct]. But the precedence of [indistinct], there's no discretion for [indistinct]. No discretion. [Indistinct] precedent but I check the Rule. It doesn't allow you discretion. For [indistinct] you talk about the [indistinct] precedent, it's about cobalt.'*

83. The names of the precedents referred to are clearly absent, recorded as 'indistinct'. It is far from unusual for transcript to include 'indistinct' portions and this fact alone does not result in an appealable error.

84. As to the appellant's "entitlement" to the audio recording, we have not been directed to any Rule or authority in support of the contention that the parties are entitled to the audio recordings. While it may be prudent, where there is a dispute as to the accuracy of a transcript, to allow the parties access to the recordings, it is not a requirement, and we further note there is no suggestion that the "indistinct" portions of transcript have in any way resulted in an error in the Stewards reasoning.

85. This ground, accordingly, fails.

Ground (b)(1)

86. Ground (b)(1) of the Appeal Notice reads:

'The Stewards erred in using SECRET REACTION under Harness Rule of Racing 190AA as a precedence for the present STAR PRESENT under AR242.'

87. At paragraph [42] of their reasons for decision, the Stewards said:

'Although the circumstances were entirely different, the matter of the pacer SECRET REACTION that was considered in Appeal 850 provides some assistance with respect to considerations that apply where substances of this kind are detected. To date, without exception, subsequent disqualifications of horses in these circumstances has been applied in reflection of the well-established long term effects of these substances and their potential to compromise the concept of a level playing field.'

88. The Stewards made it clear that the reference to that case was on the basis that it provided *'some assistance with respect to considerations that apply where substances of this kind are detected and of the well-established long term effects of these substances and their potential to compromise the concept of a level playing field.'*

89. Despite the differences between AR 242 and Harness Rule 190AA, there was no error on the part of the Stewards in our view in having regard to the above considerations which we agree are relevant to the application of AR 242.

90. We note that the Stewards in making the reference to the case of SECRET REACTION were cognisant of and expressly acknowledged that the circumstances of that case were different.

91. This ground should, accordingly, be dismissed.

Ground (b)(2)

92. Ground (b)(2) in the Appeal Notice reads:

'The stewards erred in their opinion that there was any effect of the prohibited substance on STAR PRESENT at the time race 5 May 2022 when STAR PRESENT had return (sic) a negative blood swab following her win.'

93. Rule 242(b) does not require that there be a further detection of the prohibited substance at any race in which the horse has competed subsequently to the positive swab. The Rule is concerned with the question whether *'in the opinion of the Stewards'*, the prohibited substance detected in the positive swab was likely to have had a direct or indirect effect on the horse at the time of the subsequent race. The ordinary meaning of the term 'likely' is that there is a 'substantial chance, a real, not remote chance': *Waugh v Kippen (1986) 64 ALR 195; R v Boughey (1986) A Crim R 156*.

94. The Stewards in their reasons at paragraph [42] referred to the evidence given by Dr Medd as to the effects of testosterone and boldenone and the capacity of such substances to continue to impact the performance of a horse even after the substance itself is no longer present in the horse's system.

95. Dr Medd's evidence (see page 52 of the Transcript) specifically addressed the capacity of such substances to give rise to a 'muscle memory effect' even after the substance has ceased to be in the horse's system. That is, the effect on the horse can continue even after the substance has left the horse's system.

96. On the basis of that evidence, it was open to the Stewards to form the opinion that the prohibited substances were likely to have had an indirect effect on the horse at the time of the subsequent races. This Tribunal, as has been stated in numerous decisions, will not merely substitute its own opinion for that of the Stewards if it disagrees with the Stewards' opinion. An appellant in a case such as this must satisfy this Tribunal that the Stewards' opinion is demonstrably unreasonable, *a fortiori* where the relevant provision of the Rule is expressly based on the opinion of the Stewards.
97. In her written submissions, the Appellant also argued that Rule 242(b) only applies to circumstances where there has been an *'administration of a prohibited substance rather than in the case of a presentation offence.'* That argument is based on the reference to 'administration' in Rule 242(a).
98. Rule 242 provides:
- 'If a prohibited substance on Prohibited List A is detected in a sample taken at any time from a horse being trained by a licensed trainer:*
- (a) *The trainer and any other person who was in charge of the horse at the relevant time breaches these [rules], unless the trainer or other person satisfies the ...Stewards that he or she took all proper precautions to prevent the administration of the prohibited substance to the horse;*
- (b) *The horse may be disqualified from any race in which it has competed since the taking of the sample if, in the opinion of the Stewards, the prohibited substance was likely to have had any direct and/or indirect effect on the horse at the time of the race.'*
99. In our view, what follows the chapeau of Rule 242 in paragraphs (a) and (b) are separate and distinct circumstances. We do not interpret the operation of Rule 242(b) as being conditioned by Rule 242(a), but only by the terms of the chapeau of Rule 242. That is supported by the fact that there is no conjunctive 'and' that follows the text of paragraph (a). Further, in our view a breach of Rule 242(a) will arise if a prohibited substance is detected in a horse that is being trained by licensed person, whether it can be established that person administered the substance or not. The exception provided for, namely where *'the trainer or other person satisfies the ...Stewards that he or she took all proper precautions to prevent the administration of the prohibited substance to the horse'*, does not alter the fact that the breach in the first instance arises from a detection, not by establishing an administration.
100. In our view, Appeal Ground (b)(2) is not made out. The ground should, accordingly, be dismissed.

Ground (b)(3)

101. Ground (b)(3) in the Appeal Notice reads:
- 'The Stewards erred in associating an 'intent and purpose' and 'potential impacts on performance' with AR242 where none was stated in this rule.'*
102. In further explanation of this ground, the Appellant submitted that the Rule was concerned with an administration of a prohibited substance and that the charge in this case was one of presentation not administration.

103. For the reasons set out above in respect of Ground (b)(2) above, in our view the operation of Rule 242(b) is not conditioned on establishing that there was an administration.

104. The Stewards reference in paragraph [42] of their reasons to the intent and purpose of the Rule being to address the potential inherent unfairness that arises where a horse has had such substances present in their system and its enduring capacity to impact performance, was in our view unremarkable and not demonstrative of error in their application of the Rule in this case.

105. This ground should, accordingly, be dismissed.

Ground (b)(4)

106. Ground (b)(4) of the Appeal Notice contends:

'The Stewards erred in using AR242 to disqualify the four subsequent races of STAR PRESENT.'

107. This is not a proper ground of appeal in that it does not identify any relevant error. It merely asserts that there was error. The Appellant's submissions were to the effect of repeating the contention that it must be demonstrated that there had been an administration before Rule 242(b) can apply. This contention has been dealt with above.

108. The ground must, accordingly, be dismissed.

Ground (b)(5)

109. Ground (b)(5) of the Appeal Notice contends:

'The Stewards erred in using AR248 in support of a 12 month period of application for AR242(b).'

110. Although the Stewards did refer to AR 248, the material finding and determination of the Stewards in respect of their application of Rule 242(b) is what they stated in the final paragraph [47] of their reasons, namely that after having regard to the evidence of Dr Medd, they were of the opinion that the prohibited substances were likely to have had a direct or indirect effect on the horse for the period of the subsequent races in question. For the reasons stated above in respect of Ground (b)(2), we are not persuaded that the opinion of the Stewards was demonstrably unreasonable.

111. In our view, this ground of appeal should be dismissed.

Ground (b)(6)

112. Ground (b)(6) in the Appeal Notice contends:

'The Stewards erred in ruling that STAR PRESENT was ineligible to race on those subsequent races because at the time of race, there was no prima facie evidence that STAR PRESENT had any prohibited substances. STAR PRESENT is (sic) eligible under AR to race at the time of those subsequent races.'

113. As we have set out above, Rule 242(b) does require it to be established that there was any prohibited substance in a horse's system at the time of the race. It is sufficient that the Stewards formed the opinion that the prohibited substance was likely to have had a direct or indirect effect on the horse at the time of the race, whether or not the substance was still present in the horse's system.

114. In our view, this ground of appeal should be dismissed.

Ground (b)(7)

115. Ground (b)(7) in the Appeal Notice contends:

'The Stewards had erred (in Reasons for Decision against Trainer) in their conclusion of Administration which has been dismissed by the Expert Report of Prof Tobin as highlighted at the Owners Inquiry for which no rebuttal was made by their experts at the Inquiry itself or in the Stewards' Reason for Decision against Owners.'

116. This ground seems to assert that the Stewards had concluded that the trainer had administered the prohibited substance, which was not the case. The trainer was found guilty of a presentation offence, not an administration offence.

117. In her written submissions in support of this ground, the Appellant at paragraph [48] states:

'As the Stewards did not persist with administration in their [Reasons for Decision] for the owners, the application of an Administration rule AR 242 in the present case is an error of law.'

118. For the reasons we have set out above in respect of Ground (b)(2), we do not accept the proposition that Rule 242 is an administration offence.

119. Further, to the extent that this ground contends that there was any error on the part of the Stewards in their assessment of Professor Tobin's evidence, we repeat what we have said above in respect of Ground (a)(7).

120. In our view, this ground of appeal should be dismissed.

Ground (c) Imposition of AR248

121. Ground (c) in the Appeal Notice reads:

'The Stewards has erred by applying AR248 to bar STAR PRESENT from racing for 12 months from 9 April 2022.'

122. As noted in the Steward's reasons for decision, the imposition of a 12 month ban on the horse under Rule 248(4) following the detection of the anabolic androgenic steroid was academic given that by the time the Stewards gave their decision, more than 12 months had passed since the detection.

123. AR 248(4) which provides that where a horse has had detected in its system an anabolic steroid, it must not start in any race, official trial or jump out for a period of 12 months.

124. This ground of appeal raises the question whether Rule 248(4) must be construed such that its operation is restricted only to cases where an administration or the prohibited anabolic steroid has been established.
125. The text of Rule 248(4) does not purport to restrict its operation to a case of an established administration. Although Rules 248(1), (2) and (3) are all concerned with circumstances where there has been an administration or likely administration, Rule 248(4) by its terms is expressly concerned with the circumstance of a detection of an anabolic steroid, in contrast to Rule 248(3) which is concerned with the circumstance of an administration or likely administration.
126. The fact that Rule 248(4) is contained within Division 3 of Part 11 of the Rules which are titled 'Administration Offences' does not necessitate an interpretation that confines its operation to an instance of a proven administration.
127. AR 1(3) provides:
- 'Where they appear, headings are for reference purposes only and are not to be regarded as operative parts of these Australian Rules.'*
128. In our view the underlying intent and objective of the prohibition in Rule 248(4) is to prevent horses from competing for a period of 12 months after there has been a detection of an anabolic androgenic steroid in the horse's system. That is to ensure there is a level playing field and that a horse cannot be advantaged by the enduring effect of anabolic steroids even after they have left the horse's system. Such an interpretation promotes the maintenance of confidence of both the betting public and the public more generally in the industry.
129. In our view, this ground must be dismissed.



ROBERT NASH
CHAIRPERSON



JOHANNA OVERMARS
MEMBER



NATALIE SINTON
MEMBER

